## INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Butler* v. *United States*, 273 F. 2d 436 | 9 |
| *Caudillo* v. *United States*, 253 F. 2d 513, certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931 | 7, 8, 9 |
| *DeRose* v. *United States*, 315 F. 2d 482, certiorari denied, 373 U.S. 846 | 8 |
| *Draper* v. *United States*, 358 U.S. 307 | 6 |
| *Jones* v. *United States*, 362 U.S. 257 | 7 |
| *Rossetti* v. *United States*, 315 F. 2d 86, certiorari denied, 375 U.S. 814 | 7 |
| *United States* v. *Gibson*, 310 F. 2d 79 | 7 |
| *United States* v. *Kapsalis*, 313 F. 2d 875, certiorari denied, 374 U.S. 856 | 7 |
| *White* v. *United States*, 315 F. 2d 113, certiorari denied, 375 U.S. 821 | 7 |
| *Worthington* v. *United States*, 166 F. 2d 557 | 6 |
| *Yee Hem* v. *United States*, 268 U.S. 178 | 10 |


Statutes:


| | |
|---|---|
| 21 U.S.C. 176a | 2, 3, 7 |
| 26 U.S.C. 4744 | 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 733

RICHARD DONALD COSTELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 324 F. 2d 260. A prior opinion is reported at 298 F. 2d 99.

### JURISDICTION

The judgment of the court of appeals was entered on November 4, 1963, and a petition for rehearing was denied on December 10, 1963. The petition for a writ of certiorari was filed on January 7, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence sustained the finding of the trial court that the government's informant was reliable and that the government therefore had probable cause to arrest petitioner.

2. Whether it was constitutional to presume, as provided in 21 U.S.C. 176a, unlawful importation of marihuana from its possession.

## STATUTE INVOLVED

21 U.S.C. 176a provides as follows:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years

and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

## STATEMENT

After a trial in the United States District Court for the District of Alaska, petitioner was convicted on two counts charging possession and concealment of marihuana in violation of 26 U.S.C. 4744 and one count charging illegal importation of marihuana in violation of 21 U.S.C. 176a. He was given concurrent sentences of imprisonment for five years on counts 1 and 2 and of ten years on count 3 (R. 31). On appeal, the court of appeals held that the propriety of admitting into evidence marihuana seized incident to petitioner's arrest without a warrant depended upon the existence of probable cause, which in turn depended upon the reliability of the undisclosed person whose information had led to the arrest. Since the evidence did not disclose the basis for the government's reliance on the informant, the case was remanded to the district court with instructions to hold a hearing concerning the reliability of the informant (Pet. App. B, xviii-xix).

The evidence introduced at the hearing may be summarized as follows:

The informant was Laura Jensen, also known as Jerry Coe (R. 377), a prostitute, living in Fairbanks, Alaska. In 1952, she gave information leading to the arrest and conviction of a narcotics dealer by the name of Cody, whom the police had for some time been seeking to prove was engaged in this traffic. She not only gave the information, but also arranged for a purchase from him and told the officers of the time and place of delivery so that an arrest could be made (R. 379, 437). She also told the police that Cody was obtaining his narcotics from one Childress, who shortly thereafter left Fairbanks and went to Anchorage. The information was transmitted to officers in Anchorage. Childress was later convicted on narcotics charges, although no evidence given by Laura Jensen was directly involved (R. 389, 440, 441-442). In addition, during a period of about a year before she left for the continental United States, she gave information as to prostitution which was found to be uniformly reliable, although the officers who testified at the hearing could not remember details (R. 380-381, 383, 391). Records of the United States Marshal which might reveal such details had been transferred to the archives in Juneau after statehood and were not readily available (R. 383).

After being in the continental United States about four years, Laura Jensen returned to Anchorage. She looked up one of the officers who had worked on the Cody case and asked him if he would like to have

information as to petitioner's dealings in narcotics. That officer, who was now with the Bureau of Indian Affairs, talked to an officer concerned with narcotics investigations and acquainted him with Mrs. Jensen's previous assistance, especially in connection with the Cody case (R. 384-385, 398-401, 444). Mrs. Jensen thereafter made a number of contacts with petitioner, who refused to sell her any marihuana, but gave her marihuana cigarettes, one of which she produced for the officers and as to which she gave a written statement (R. 403-404, 420, 445). Arrangements were made for the officers to watch the taxicab office from which petitioner operated while Mrs. Jensen paid him a visit to ascertain if he had any marihuana cigarettes on his person. She would then return to her home and call police who would notify the surveilling officers by radio. Mrs. Jensen followed the plan exactly. After she informed the officers, they immediately made the arrest, finding the marihuana as they had been told (R. 401-402, 405-406, 446-447, 457).

During the period of the investigation of petitioner, Mrs. Jensen also gave information a number of times as to the activities of prostitutes and houses of prostitution, which proved to be reliable. No prosecutions were instituted because the officers were using her in connection with the investigation of petitioner (R. 405-406, 432-433, 447-448, 453, 454).

The trial court concluded that the informant was reliable, that the officers reasonably believed that she was reliable, and that they had probable cause for petitioner's arrest (R. 364-369). The court of appeals affirmed (Pet. App. A).

## ARGUMENT

1. The findings of the district court—which were affirmed by the court of appeals—that the informant was reliable and that an arrest under the circumstances disclosed was based upon probable cause present no question warranting further review. The evidence just summarized showed that Mrs. Jensen had furnished uniformly reliable information as to numerous violations of law over a period of several years.

In *Draper* v. *United States*, 358 U.S. 307, 313, in considering the reliability of information provided by an informant, the Court held:

> "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, [338 U.S. 160,] 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162.

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*Worthington* v. *United States*, 166 F. 2d 557 (C.A. 6), upon which petitioner relies (Pet. 11) in claiming a conflict with the Sixth Circuit, was disapproved in *Draper*, 358 U.S. at 312, note 4.

Thus, no particular kind of information is needed to show an informer's reliability as long as the officers could reasonably believe that the informer was trustworthy. The record in this case plainly satisfies this test and the officers were thus fully justified in relying upon the information received from Mrs. Jensen in making the arrest. Cf. *Jones* v. *United States*, 362 U.S. 257, 269.

2. Section 176a of Title 21 U.S.C., *supra*, creates a presumption that a person found to have possession of marihuana has knowingly imported it into the United States contrary to law or knowingly received concealed, bought, sold or transported illegally imported marihuana in violation of that Section. "[S]uch possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." *Ibid.* The federal courts have repeatedly upheld the validity of this statutory presumption on its face. See, *e.g.*, *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *United States* v. *Gibson*, 310 F. 2d 79 (C.A. 2); *United States* v. *Kapsalis*, 313 F. 2d 875 (C.A. 7), certiorari denied, 374 U.S. 856; *Rossetti* v. *United States*, 315 F. 2d 86 (C.A. 9), certiorari denied, 375 U.S. 814; *White* v. *United States*, 315 F. 2d 113 (C.A. 9), certiorari denied, 375 U.S. 821.

Petitioner argues that these decisions do not apply here because a government witness testified that marihuana grows in the United States as well as in foreign countries and that the "manicured" marihuana cigarettes seized in this case contained only portions

of the leaves of the plants, rather than portions of seeds and stalks as well as leaves (R. 271-272, 277). "Manicured" marihuana is that screened for smoking so that most of the pieces of seeds and stalks are removed. In the *Caudillo* case, the court of appeals pointed out that, in the "unmanicured" state of the marihuana there involved, the presence of seeds indicated that the plant had gone to flower. Since the flowering tops come only at maturity, it was unlikely that the marihuana could have come from the United States, where such plants as are grown are seldom permitted to mature. 253 F. 2d at 515-516. It was not the seeds in themselves, but the proof of flowering which the court found to furnish added support for the validity of the presumption of importation under the facts of that case.

The court below properly held that petitioner, if he wished to attack the validity of the presumption on the basis of particular facts, had the burden of introducing these facts (*DeRose* v. *United States*, 315 F. 2d 482 (C.A. 9), certiorari denied, 375 U.S. 846) and that petitioner had failed to do so. The court pointed out that the strength of any inference is dependent upon the generality of experience upon which it is founded. The record in this case does not show that the statutory presumption as applied to this case is in any way contrary to experience. There was no exploration as to whether it is possible to determine the maturity of manicured marihuana. In fact, chemical analysis may show that flowering has occurred even though no seeds are present. Moreover,

while the record shows that marihuana is grown in the United States as well as elsewhere, there was no evidence as to the relative amount of domestic and imported manicured marihuana in this country.

The court below stated that "in the *Caudillo* and *Butler* [*Butler* v. *United States*, 273 F. 2d 436 (C.A. 9)] cases we took note of the fact that while 'unmanicured' marihuana is seldom produced in the United States, 'manicured' marihuana is seldom imported" (Pet. App. ix).[1] The court distinguished the present case on the ground that the record here "contains no such evidence" (*ibid.*).

This distinction is no mere procedural nicety. If petitioner had raised this issue, the government would have been prepared to offer evidence directly contrary to the court of appeals' statements [redacted] in *Butler*. The court reasoned in *Butler* that unmanicured marihuana is more valuable since marihuana is sold by weight or bulk; therefore there is no reason for a seller to remove the seeds and stems from marihuana grown outside the United States; that because law enforcement officers watch for the marihuana plant in the United States, it is not usually allowed to grow long enough to go to seed; and that consequently, most manicured marihuana is grown in the United States. 273 F. 2d at 439. The court's analysis completely misunderstands the difference between manicured and unmanicured marihuana. Marihuana as harvested is unmanicured

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[1] In fact the *Caudillo* case does not contain this reference. However, the reference in *Butler* is to testimony in the *Caudillo* case.

whether it has been allowed to flower and therefore contains seeds or not. For, in either event it contains pieces of stalk. In order to be suitable for rolling in cigarettes at all, the marihuana must be crumbled, dried, and at least partially screened to remove large pieces of stalk. Consequently, all marihuana is ultimately manicured to some extent. The finer the marihuana is screened (*i.e.*, manicured), the *more* valuable it becomes. This is because only the leaves and seeds produce a euphoric effect when the marihuana is smoked. While the screening removes much of the seed as well as the stalk, the overall effect is to increase the quality and potency of the marihuana.

In short, the fact the marihuana has been manicured does not establish whether or not it has flowered; it merely makes it more difficult to determine whether the marihuana has flowered because most or all of the seeds have been removed. Consequently, the presumption that most marihuana possessed within the United States has been illegally imported applies just as well to manicured or unmanicured marihuana.

Petitioner seeks (Pet. 7) to draw a distinction between the presumption as to marihuana and the presumption as to opium upheld by this Court in *Yee Hem v. United States*, 268 U.S. 178, on the ground that opium is not grown in this country. However, opium may be legally imported for medicinal purposes. The significant fact is that the restrictions on importation are so great that it is reasonable to presume that the drug was imported illegally. Similarly,

here, it is so unlikely that the marihuana was grown in the United States that it is reasonable to presume that it was imported.

## CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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